IN THE

Supreme Court of the United States

No. 77-1073

LEE PHARMACEUTICALS,
Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent.

DEN-MAT, INC., ROBERT IBSEN, W. RICHARD GLACE, FRED H. BROCK AND PROFESSIONAL PRODUCTS CO.,
Real Parties In Interest.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Viewed as a whole and in context, all papers before this Court on this petition depict a typical, albeit perhaps aggravated, example of the kind of trial judge conduct which has contributed to bringing the judicial system into its current state of public repute—probably the lowest in American history. At the core of this crisis in

public confidence lies the broad issue of whether judges *must* appear to strive to effect justice in an evenhanded manner, as 28 U.S.C. § 455(a) in terms requires, or whether they may succumb to the temptations of petty tyranny and allow themselves to appear arbitrary, malicious and personally involved in the cases they handle. Prompt resolution of this broad issue is focal to whether the lofty claim that this society venerates and pursues as its goal the rule of law, not men, will even survive the present generation. Any continued toleration of unrestrainedly aberrant judicial conduct, however rationalized, by failing to curb, and thereby fueling, its ever burgeoning incidence, will only propel current public dissatisfaction with the judiciary into public rebellion against the rule of law itself—a dire prospect indeed.

The so-called "real parties in interest"—defendants in the district court—effectively concede the overwhelming public importance of the questions presented at Pet. 2-4 [1]

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[1] Challenge is purportedly made to this Court's "jurisdiction" (R.P. Br. 2-3) to review the questions but on bases so ephemeral as to require no real discussion. Thus,

a) It is specious even to suggest that petitioner's own all-too-prophetic assertion in No: 77-259, that the "review" by a fellow district judge, which Judge Curtis sought on July 20, 1977 (App. 7a-8a), of his own prior Order 48 (App. 4a) and 49 (App. 5a-6a) refusing to disqualify himself, "can never result in any action of any meaningful nature" (R.P. Br. 2) *could* deprive this Court of "jurisdiction" to review the decision that Judge Pence rendered pursuant to such procedure.

b) The assertion that Judge Curtis never had an opportunity to rule upon "the legal or evidentiary sufficiency" (R.P. Br. 3) of the affidavit of Dr. Leon Yochelson, a qualified psychiatrist (App. 34a-42a), is inconsistent with the necessarily acknowledged *fact* that Judge Curtis *did* evaluate the affidavit, as reflected by his own "Memorandum to Chief Judge Stephens" (App. 7a-8a) which avowedly sets forth the result of that evaluation.

c) Defendants' bald assertion that the fifth question (Pet. 3) was not before Judge Curtis attempts to exploit the unavailability to this Court of the totality of the record below, and to play upon the fact that the question was not presented elsewhere *in haec verba*. The whole record below shows that this question fairly summarizes all the substantive bases on which petitioner has continuously asked Judge Curtis to disqualify himself from February 1977 to the present, *all* of which were also presented to Judge Pence on September 14, 1977.

and the correctness of the "Statement of the Case" appearing at Pet. 5-20. Considered in context of the whole case as thus revealed, the "real parties' " brief is *per se* eloquent testimony to the inevitability of extinction of public confidence in the judicial system and in the integrity and fairness of the judicial process if district court conduct such as that here questioned not only continues to be tolerated, but remains unreviewable until after all issues of a pending suit have been disposed of on their merits by a judge whose demeanor proclaims his partiality.

"Real parties' " efforts at statistical analysis of the record below and their various acknowledgements of its sorry posture, even though far less than faithful to the totality of the *actual* record—and hence in furtherance of a pervasive attempt to exploit the unavailability of the whole record here [2]—unwittingly reveal clearly that:

1. Contrary to the implication of "real parties' " spurious question 1 (R.P.Br. 4), petitioner's 28 U.S.C. 455 (a) challenge to Judge Curtis was *not* advanced because

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[2] This attempted exploitation is severely aggravated by attempted reliance at R.P. Br. 2 and 9-19 inclusive, on a testimonial affidavit of Arthur Martin filed in No. 77-259 in this Court, and its various exhibits. The exhibits are objected to because they afford a fragmentary and distorted, *untrue* picture of the whole record below and moreover, are not at all necessary to an understanding of the "questions presented" at Pet. 2-4.

Petitioner also objects strongly to any consideration of this Martin affidavit *per se* for any purpose because it constitutes noncognizable testimony of opposing *counsel*, violative of DR 5-101(B) and 5-102 of the Code of Professional Responsibility and hence is incompetent.

"he . . . merely made rulings adverse to" (*ibid.*) petitioner but, rather, because the demeanor of the rulings, among which Order No. 98 (R.P.Br. 16) is exemplary, is hostile to plaintiff and its counsel to an extreme. See also R.P.Br. 17-19.

2. Contrary to the implication of "real parties'" equally spurious question 3 (R.P.Br. 4), Judge Curtis has not "calmly controlled his considerable irritation" (*ibid.*). See R.P.Br. 16-19. Rather—and conversely to the facts in *In re Union Leader Corp.*, 292 F.2d 381 (1 Cir. 1961) cited at R.P.Br. 22—Judge Curtis "has been in the business of attacking" petitioner and its counsel, *ad hominem* and unrestrainedly. In particular, Judge Curtis has taken the position, in substance, that petitioner and its counsel, by respectfully disagreeing with him based on the law itself, is guilty of bad faith and frivolity —hardly a judicial attitude. Petitioner and its counsel have never "attacked" the judge or resorted to "threats" or name calling, but have simply properly endeavored to use every reasonable available avenue of seeking appellate review and to preserve every reasonable objection that the law affords, because this is necessary to petitioner's welfare.

3. The continuing uninhibited airing of Judge Curtis' venom against petitioner and its counsel has left the petitioner with no choice but to augment its previous disqualification motions as new incidents indicative of partiality occur, lest it later be said that reliance on these new incidents was waived. *Cf.* "real parties'" captious question 2 at R.P.Br. 4.

4. The presentation in this Court only short months ago of the petition in the No. 77-4 simply underscores (i) the rapidity with which public confidence in the judicial system continues to crumble, (ii) the severity of the particular Ninth Circuit problems raised by the petition, and (iii) the need to resolve them *now*. For example,

reported decisions of major, conflicting cases relating to the interpretation of 28 U.S.C. 455(a) from other circuits have grown by three since the petition in No. 77-4 was filed—viz. *United States* v. *Bray*, 546 F.2d 851 (10 Cir. 1977), *Webb* v. *McGhie Land Title Co.*, 549 F.2d 1358 (10 Cir. 1977) and *SCA Services* v. *Morgan*, 557 F.2d 110 (7 Cir. 1977), all cited at Pet. 25.

5. "Real parties'" *only* reason for opposing review in this case rests on their selfish and desperate desire to preserve the unfair advantage that accrues to them so long as Judge Curtis continues to sit. Were it otherwise, *even they* must blush at such unsupportable emotional extravagances as, e.g.,

a) the false and ludicrous assertion that petitioner "has abandoned its claims" on the merits below (R.P. Br. 8);

b) the not only false but plain silly statement that "petitioner denies that the Courts of the United States possess jurisdiction to make any findings and render any conclusions adverse to it" (R.P.Br. 8);

c) the misrepresentation by omission in subparagraph (1), R.P.Br. 11 which carefully conceals that the motion in question primarily sought a full revelation of all facts relating to Judge Curtis' direct and indirect *ex parte* contacts with "real parties";

d) the outright falsehood that petitioner's president by affidavit "directly charg[ed] . . . [Judge Curtis] with impeachable conduct" (R.P.Br. 10);

e) the significant omission of the fact of continued pendency of a petition for rehearing *in banc* in Ninth Circuit Appeal No. 77-2054, referred to in note 16 at R.P.Br. 11 and again at R.P.Br. 13-14, as "dismissed";

f) the prevarication that "real parties'" counsel's two challenged testimonial affidavits filed in deroga-

tion of Disciplinary Rules 5-101(B) and 5-102 of the Code of Professional Responsibility both deal with "his clients' proprietary information" (R.P.Br. 13) when in fact, in one of them counsel Martin purports to testify on the merits as to the alleged non-protectability of *petitioner's* trade secrets in issue;

g) the related concealment of the fact that the "motion to disqualify counsel to real parties in interest" (R.P.Br. 12) was grounded on these same two unethical testimonial affidavits;[a]

h) the egregious misrepresentation in subparagraph (t) at R.P.Br. 14-15 flatly attributing "beliefs" (*id.* at 15) to petitioner and its counsel which they have *at no time* espoused;

i) the falsehood that plaintiff's counsel made a "naked threat to a United States District Judge" (R.P.Br. 17 n.38) of a libel and slander suit when "real parties" well know—and the relevant memorandum *in context* shows—that the quoted portion

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[a] Significantly, the reason that Judge Curtis gave for refusing to permit transmission of the two unethical affidavits to the grievance committee only was "I might lose control of some of these matters which have been submitted here under certain restraints, and I am not going to release them and they are not necessary anywhere." (February 27, 1978 transcript, p.5 ll. 2-4) and *not*, as falsely stated by "real parties" in note 20, R.P. Br. 13 that "the motion had been filed in 'bad faith' ".

The whole incident is especially revealing of the apparent partiality of Judge Curtis when contrasted with his refusal to prevent a slanderous public dissemination by "real parties" of Order No. 98, various epithets from which are quoted at R.P. Br. 16.

Thus, unethical testimonial affidavits by *defendants'* counsel may not even be viewed *in camera* by the grievance committee; yet the judge's own incorrect fact findings against *plaintiff's* counsel are publicly available despite the pendency of appellate review, clearly available under the "collateral order" doctrine.

of the memorandum was *not at all* directed to the judge, but rather to "real parties" themselves;

j) the deliberate republication, with an erroneous implication of versimilitude, of the factually inaccurate findings by Judge Curtis (pars. (a) to (i) at R.P.Br. 17-19) which are slanderous, libelous or both in defendants' mouths and which symptomize irrefutably the malice that Judge Curtis bears the plaintiff and its counsel in derogation of 28 U.S.C. 455 (a);

k) the false charge, refuted by the whole record below, that petitioner has made no effort to advance the case below on the merits except by this petition (R.P.Br. 19-20);

l) the misrepresentation (R.P.Br. 20) that Nos. 74-620 and 77-203, neither of which involved either this petitioner or any facet of the interpretation of 28 U.S.C. 455(a), are or could be related to this petition;

m) the misrepresentations at R.P.Br. 21 that

(i) Judge Pence rendered an "independent review" as to whether Judge Curtis appears to be partial in derogation of 28 U.S.C. 455(a), when the record shows that Orders 48 (App. 4a) and 49 (App 5a-6a) were *not* first vacated, so that the possibility of "independent review" by a coordinate district judge was hence foreclosed;

(ii) the Court of Appeals *affirmed* on their merits, the refusals of disqualification in the district court, whereas General Order No. 4 of the Ninth Circuit holds summary denial of manda-

mus "shall not be regarded as a decision on the merits" (App. 70a).[4]

The very resort to these excesses is a tacit confession that "real parties" *know* review is desirable—even needed—and can make no *honest* arguments against grant of the writ.

CONCLUSION

In the interests of the public as a whole, the questions raised by this petition should promptly be answered. Grant of the writ as asked is accordingly requested.

Respectfully submitted,

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[4] Because these *were* summary denials, the use of so-called appellate "judicial personpower" (R.P. Br. 22; See also R.P. Br. 20, n.47) was manifestly minimal, and *may* well have involved little more than signing or initialling dismissal orders.